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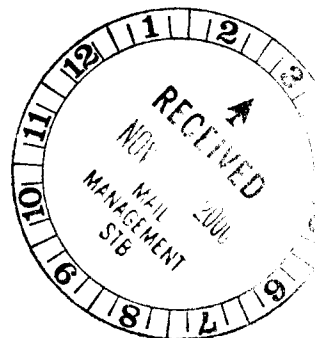
Rail Labor Division



IN MEMORIAM
RICHARD R. FOLEY
Secretary-Treasurer
Brotherhood of Railroad Signalmen
1951-1999

November 17, 2000

The Honorable Vernon A. Williams
Surface Transportation Board
Office of the Secretary, Case Control Unit
1925 K Street, NW
Washington, DC 20423-0001



RE: STB Ex Parte No. 582 (Sub-No. 1)

Dear Secretary Williams:

I am pleased to submit the comments of the Rail Labor Division (RLD) of the Transportation Trades Department, AFL-CIO in response to the above captioned notice of proposed rulemaking (NPRM). TTD represents 30 transportation unions including the 12 rail labor organizations affiliated with our RLD and whose members operate, build and maintain our nation's railroad industry.

TTD has been an active participant in the debate over railroad merger policy and we are pleased to submit and concur with the comments of our RLD.

Sincerely,

Edward Wytkind
Executive Director

Enclosure

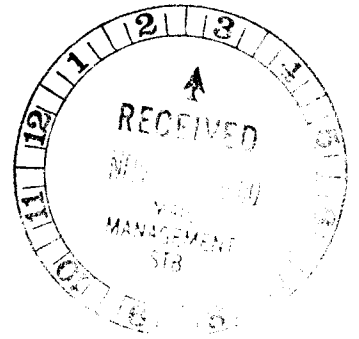
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STB
MANAGEMENT

TRANSPORTATION TRADES DEPARTMENT, AFL-CIO

2009/20

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE No. 582 (Sub. No. 1)



MAJOR RAIL CONSOLIDATION PROCEDURES

**COMMENTS OF THE RAIL LABOR DIVISION
TRANSPORTATION TRADES DEPARTMENT, AFL-CIO
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING**

Pursuant to the Board's decision served on October 3, 2000, the Rail Labor Division of the Transportation Trades Department, AFL-CIO ("RLD") and its affiliated organizations¹ submit these comments in response to the Board's Notice of Proposed Rulemaking ("NPR") and request for comments regarding its proposed modifications to its regulations governing major rail consolidations.

The RLD appreciates the fact that the Board's proposals have recognized that there are serious problems with the current major consolidation regulations which clearly favor consolidation applicants and effectively devalue the concerns and interests of rail workers, communities and shippers. The RLD also acknowledges that the Board identified the ways in which the current rules have harmed Rail Labor and others, and that the Board apparently intended the new proposals to address those concerns. However, the RLD submits that if the Board intends to fix the problems, it must speak more specifically, more clearly and more directly in a number of areas. Because the ICC and STB have often given conflicting signals on

¹ American Train Dispatchers Department; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Hotel Employees and Restaurant Employees Union; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; Service Employees International Union; Sheet Metal Workers International Association; Transportation • Communications International Union; Transport Workers Union of America

the assessment of public transportation benefits and the cramdown issue, and because the Carriers have successfully exploited ambiguities and mixed messages in those areas, the RLD submits that the new proposals should be especially clear and detailed and mandatory rather than advisory in those areas.

I. GENERAL POLICY, CONSOLIDATION CRITERIA, DOWNSTREAM EFFECTS AND ASSESSMENT OF THE PUBLIC INTEREST

1. RLD agrees that the major consolidation rules must be changed so that they no longer “tilt” toward approval of an application. Recent experience has shown that despite the repeated claims of the applicants, the assurances of consultants and academics paid for by the carriers and the hopes of the ICC and STB, the public does not necessarily benefit from these transactions. Indeed the most recent experience has been adverse for everyone affected by the transactions except the executives who departed with huge buyout packages. Accordingly, it is appropriate for the Board to state as it has suggested in proposed Section 1180.1(a), that applicants must show that there are substantial and demonstrable public benefits to a transaction that can not otherwise be achieved.

However, the RLD submits that the Board should make it clear that this applies to all major consolidations and not just those that arguably might reduce railroad competition and competition from other transportation alternatives. The old rules promoted mergers for the purpose of “rationalizing” the rail system and assumed that consolidations would promote efficiency in operations. Consolidations were presumed to be advantageous and were approved unless countervailing considerations militated against approval. The new rules are supposed to be designed to end that tilt; in fact they should place a burden of proof on the applicants. The next

major consolidations will be national in scope and will necessarily affect transportation throughout the country and will reduce the industry to two or three mega-carriers. It was those facts that prompted the Board to revise its regulations on major consolidations, and those facts also support a clarification of the proposed regulations so that all major consolidation applicants would be required to show that there are substantial and demonstrable public benefits to the transaction, and that they can not be achieved through other means.

The RLD also submits that the Board should modify its proposed Section 1180.1(a) to clarify that “greater economic efficiency” means greater economic efficiency generally for the nation or regions served by the carriers involved, and not greater economic efficiency for the carriers themselves. As the Board is now aware, carriers have used the concept of improving their own efficiency as a government approved bludgeon in their dealings with Rail Labor to force reductions in the carriers’ own labor costs. While the Board may consider whether a transaction itself will promote better transportation for shippers and the public at large, the Board should have no interest in placing a governmental thumb on the scales in the relationship between Rail Labor and Rail Management. Nor do shippers or the public have a legitimate interest in having the government reduce labor costs for the carriers. For many years the carriers have distorted and exploited the concept of greater economic efficiency by using ICC/STB approvals of transactions as a justification for abrogating collective bargaining agreements. They have asserted that changes in rates of pay, rules and working conditions would supposedly make them more efficient, so the changes were mandated by the general policy favoring greater economic efficiency. In *Railway Labor Exec.s Ass’n. v. United States*, 987 F. 2d 806, 815 (D.C. Cir. 1993), the Court of Appeals for the D.C. Circuit cautioned that “public transportation

benefits” should not be used as a cover to “merely transfer wealth from employees to their employer” and that with respect to the public interest in quality rail service, it is important to determine whether “enhanced service levels result solely from reduced labor costs stemming from the modifications to the CBAs—when a producer’s marginal costs declines it increases its output. i.e. service—or whether the leases themselves yield increased efficiencies”. However, in the years since that decision, the carriers have succeeded in selling the notion that their economic well-being is part of the concept of greater economic efficiency and is thus a part of the larger public interest.

While this problem must be addressed directly with respect to cramdown issues, the Board should make it clear in its general policy statement on major consolidations that “greater economic efficiency” refers not to the operating costs of the carriers, but to efficiency in transportation for the regions involved; that the efficiency must come from the transaction itself, and not from an inference that government license for the transaction is license for the applicants to alter their costs of doing business. Similar clarification is required in Section 1180.1(b) and (c), that carrier efficiency refers to promoting “an efficient and reliable national rail system” as part of “the broader transportation infrastructure” as is later stated in that subsection, and in the Board’s explanatory remarks in Section 1180.1(b).

2. Given the concerns expressed by the Board and many commenters regarding the need for a refocusing of the consolidation policy, the RLD agrees that the Board should analyze the likely “downstream effects” of a proposed Transaction.

3. Rail Labor applauds the Board’s recognition that forecasts of public benefits in recent transactions have not turned into real public benefits, and that it is necessary to look with more

skepticism on the claims that applicants make. However, the RLD believes that the Board has understated the problem in asserting that claimed benefits have been “delayed” by transition problems, while noting that service has improved. It is not at all clear that the claimed benefits will ever be realized. The recent improvements of some carriers have effectively restored them to the level of service provided prior to the initiation of the most recent round of consolidations, while on other carriers the improvements have seen service change from terrible, to bad, to below pre-transaction standards.

The RLD agrees with the Board that it can no longer simply accept facile assertions of projected benefits, but the RLD respectfully submits that the Board has not gone far enough in its proposed new requirements regarding the showing that must be made by applicants. The RLD again urges that the Board require applicants to produce evidence to support their claims, not just the opinion of their own managers and “hired-gun” experts; to substantiate their claims based on prior experience, actual operational studies and pilot programs, customer surveys or some other objective analysis; and to provide their own internal reviews of possible reasons why alleged benefits might not be realized along with their reasons for concluding that the positive scenario is more likely than the negative or status quo scenario. Finally in this regard, the Board should critically test the claims, supporting evidence, and analyses of the applicants by, at a minimum, imposing an express burden of proof on applicants to show by “clear and convincing evidence” that the projected benefits are likely to be realized. The RLD again urges that the regulations at 49 C.F.R. 1180 be amended to add the following language at new Section 1180.1(c)(3):

In order for a transaction to be approved, the applicants must show, by clear and convincing evidence, that the projected public interest benefits are likely to be realized and likely to outweigh any potential harm to the public interest.

4. In its explanatory remarks regarding the public interest considerations (Section 1180.1(c)) the Board indicated that it would consider the removal of “paper” and “steel” barriers as potential competition preservation or enhancement actions. The RLD urges the Board to move carefully in that area and not to suggest that it would encourage such an approach to dealing with competition problems. As the RLD noted in its Comments on the ANPR, many of these “barriers” were the result of line sales by Class I railroads that Rail Labor argued were not genuine transactions because the sold lines would not really be independent of the Class I’s. Instead, they would simply feed traffic to the Class I’s, remaining effectively parts of the systems of the Class I’s but with fewer employees working at lower pay rates under inferior terms and conditions of employment. Rail Labor specifically noted that, in many cases, there were financial inducements and penalties in those deals to insure that supposedly independent new carriers would necessarily feed traffic only to the Class I’s, and that the supposed lower operating costs for the shortlines and regionals merely reflected their ability to reduce labor costs by cutting employment and pay and abrogating standard national collective bargaining agreements. The shortlines and regionals denied all of Labor’s charges, but many of them, and many shippers who supported them, now acknowledge that they are not truly independent of the Class I’s that sold them their lines. The RLD submits that, in considering competition preservation/enhancement mechanisms, the Board should tread warily when considering requests for removal of “paper” and “steel” barriers, and that such relief should not be given when the barriers complained-of were a part of a line sale deal predicated on the supposed independence of the purchaser.

III. SAFE OPERATIONS

In response to the ANPR, Rail Labor proposed that the Board recognize “unsafe operation of rail service” as a “potential result from consolidations which would ill serve the public” in Section 1180.1(c)(2) of the current merger procedures and add a new subsection (iii) to Section 1180.1(c)(2) explaining the importance of considering safety.² The Board has proposed changes to Section 1180.1(c)(2) but unfortunately none of them address safety. The RLD believes this is short-sighted. Highlighting safe operations at the outset of the Board’s Rules would confirm the significance the Board places in assuring the public that it is not just economics that drive the Board’s consideration of how a proposed merger serves the public. In particular the RLD urges that the Board recognize that the ability of carrier to operate safely is not just an issue at the time of integration, but a concern in each day of operation and that it is therefore appropriate for the Board to require that applicants show that they will have the financial ability to insure continued safe operations after the transaction is consummated, and produce a “safety inventory” that

² Rail Labor proposed adding the following subsection:

Unsafe operation of rail service. Consolidations have the potential for reducing the level of safety in the rush to eliminate redundant operations, combine facilities, reduce expenses, and increase profitability. Operating efficiencies are not real if they come at the cost of unacceptable safety risks to rail employees and the public. In assessing the impact of proposed consolidations, the Board will focus on ensuring that safety concerns are not overlooked and that safety is not compromised in the consolidation process. In that regard, the Board will scrutinize the condition of applicants’ tracks, structures, dispatching and signal systems, locomotives and rolling stock, and the applicants’ plans to maintain and/or upgrade those physical assets, and, in conjunction with the Board’s assessment of the applicants’ financial filings, determine whether the proposed merged carrier will possess the financial wherewithal to undertake whatever expenditures are necessary to maintain safe operations.

would analyze the condition of tracks, structures, dispatching and signal systems, locomotives and rolling stock, and explain plans to maintain and/or upgrade those physical assets. The RLD urges the Board to reconsider, and to add to its new regulations the language suggested by Rail Labor.

We recognize that the Board has proposed a new reference in proposed Section 1180.1(f) to working with the Federal Railroad Administration to formulate safety integration plans and that the obligation to file a safety integration plan as part of the applicant's operating data is set forth in proposed Section 1180.8(a). However, this is nothing new and merely confirms existing procedures. We appreciate the Board's explanation that its joint rulemaking with FRA concerning safety integration plans is ongoing and that until that proceeding is complete, the Board "will continue to address these safety integration issues on a case-by-case basis." Nevertheless, we believe that the language we have presented does no harm to that continuing process and would go far to remind merger applicants and the public of the Board's heightened concerns regarding how mega-mergers can affect safety.

IV. CRAMDOWN

The RLD appreciates the Board's identification of the carriers' use of "cramdown" as a current and potent source of friction in labor-management relations. Unfortunately, the RLD cannot endorse the Board's proposed change to 49 C.F.R. §1180.1(e) because it effects no real change in the *status quo*, and, therefore, will do nothing to reduce labor-management conflict over cramdown.

The first mistake in the Board's proposed rule is the statement that the Board only is required to provide "adequate" protection to employees of applicants affected by a rail merger.

In fact, Section 11326(a) of the ICCTA imposes a mandate that the Board impose a “fair arrangement” that is protective of the employees. *Black’s Law Dictionary, 5th Ed.* defines “fair” as “just; equitable, even-handed; equal, as between conflicting interests.” Conversely, *Black’s* defines “adequate” simply as “sufficient.” Because, Section 11326(a) uses the term “fair arrangement,” the RLD submits the Board should use the same phrase in the proposed Section 1180.1(e). This is so for two reasons. First, because the Board cannot by rulemaking amend its governing statute, the Board cannot adopt a rule that will result in protective conditions that do not provide a “fair arrangement” for employees. Second, the use of an alternative word such as “adequate” could lead to confusion among labor and management as to whether the Board has articulated a new standard as to what constitutes a “fair arrangement.” As the RLD’s initial comments showed, the carriers’ use of “cramdown,” as ratified by the ICC/STB has been fundamentally “unfair” to the interests of employees. The Board’s proposed rule must drop the reference to “adequate” and restate the statutory standard of “fair arrangement.”

Unfortunately, that change in wording will not resolve the larger “cramdown” issue. The Board’s comments to the proposed rule encourage the parties to make a private settlement of this dispute. The RLD agrees with that general approach, but in a different manner than that suggested by the Board. Our comments stressed that the parties already had a private settlement, the Washington Job Protection Agreement (“WJPA”), that provided the appropriate means for selecting forces and assigning employees involved in merger-related transactions and had been used successfully by the parties from 1936 to 1980. In both *Carmen II* and *Carmen III*, the Board commented favorably on the use of the WJPA’s procedures as creating general labor peace regarding merger transactions during that period. The RLD again urges the Board to expressly

adopt its proposal in this regard because the RLD proposal incorporates a private settlement of the cramdown issue through procedures already endorsed by the Board and its predecessor.

While the Board's support for private settlements is admirable, its request that the parties attempt to create a private resolution of the cramdown issue betrays a fundamental misunderstanding of bargaining leverage and the current positions of the parties. The *status quo* permits a carrier to obtain "cramdown" relief by demonstrating to an arbitrator that the change or abrogation of a contract is somehow merger-related and will foster some change in operations that will provide a virtually unquantifiable public transportation benefit; as is noted above, oftentimes the asserted public benefits is merely a reduction in labor costs for the carrier which supposedly will somehow be passed along to the public. Moreover, as the Board restated in *Carmen III*, the carrier does not "bear a heavy burden (for example, through detailed operational studies) in justifying operational and related work assignment and employment level changes that are clearly necessary to make the merged entity operate efficiently as a unified system rather than as two separate entities." *Carmen III* at 27, quoting, *Fox Valley & Western Ltd.—Exemption Acquisition & Operation—Certain Lines of Green Bay Western R.R.*, Finance Docket No. 32035 (Sub-Nos. 2-6), served August 10, 1995 at 3. In practice, arbitrators have restated the *Fox Valley* standard as saying the carrier does not carry a "heavy burden" in demonstrating "that its actions will result in a transportation benefit in furtherance of the STB's order." *Union Pacific R.R. and Bhd. of R.R. Signalmen*, arbitration under Article I, Section 4 of *New York Dock*, dated August 20, 1997 (Benn, Arb.) at 2. Or as the arbitrator in that case held, the carrier met its burden in showing that it could operate more efficiently with the changes requested than without them. *Id.* at 4. The Board never has found that an arbitrator went too far in saying an agreement could be

modified or abrogated. Accordingly, the carriers look at the present environment as giving them license to do whatever they want, and they have little incentive to make substantive concessions to resolve the dispute. The RLD submitted comments to the Board *because* the private settlement avenue was unsuccessful. The Board's proposed rule merely pats Rail employees on their heads and sends their unions back to the table with the *status quo* unchanged.

The Board's statement of its respect for the "sanctity" of collective bargaining agreements does not otherwise change that dynamic. That statement is all well and good. The problem is, as one commentator opined, the Board's proposed rules contains "round" words devoid of any edge or cutting power. In the *Carmen II* decision, the ICC stated, "we will expect arbitrators to hold both parties to the contracts that they have voluntarily signed." 6 I.C.C.2d at 749. The Commission added, "we believe this expresses the synthesis reached in the 1940-1980 period—CBAs will be respected, observed (or 'preserved') and limited modifications will be permitted only when necessary to complete an approved merger or consolidation." *Id.* Those pronouncements from 1990, preceded the aggressive use of cramdown to abrogate entire agreements. Simply put, "round words" from the ICC or the Board are insufficient to resolve this dispute. The Board must adopt a clear policy—that policy must be that cramdown is dead. Adoption of the RLD proposed rule is the remedy to the cramdown problem.

V. TRANSFERS/RELOCATIONS

In its explanatory comments in Section 11801.b, the Board encouraged private sector agreements and acknowledges that it has proposals before it, which are being "seriously considered," seeking new rules involving issues "such as the need for employees to relocate in

order to retain their jobs.” The Board then urged the major railroads and their unions to negotiate broad based agreements about such issues and report back to the Board.

While RLD appreciates that the Board has now recognized that mandatory transfers of employees pose serious concerns warranting the Board’s attention, we suggest that the Board should have addressed those concerns in the current rule.

In its opening comments, the RLD detailed, with specific examples, the hardship placed on employees being required to relocate long distances as the result of a major rail transaction. The RLD pointed out that, as rail mergers covered increasingly broad geographic areas, the distances employees were being required to relocate has dramatically increased. The current *New York Dock* conditions are simply inadequate to address this problem, and the RLD respectfully submits that the Board should do so, at this time, by adopting the rules proposed by RLD. (See RLD Comments pp. 23-24).

VI. TEST PERIOD AVERAGES

The RLD notes that the Board did not address the RLD’s request that the regulations at Section 1180.1(e) provide for modification of the Board’s employee protective conditions to expressly state that employees should be furnished with Test Period Average (“TPA”) data upon their request.

Neither the calculation of the TPA, nor the furnishing of a TPA to an employee, constitutes a determination that a transaction-related adverse effect has occurred, and is not “pre-certification” of an adverse effect. The TPA merely provides the means for the employee to help determine whether there has been an adverse effect and to quantify the severity of the adverse

effect for a given month. The TPA also enables the employee to fulfill the obligation to work the highest-rated position available to the employee in the normal exercise of his/her seniority.

Nonetheless, carriers have resisted performance of this relatively simple administrative function in the hope of frustrating employees in their efforts to obtain benefits to which they are entitled. They have argued that they are not required to furnish a TPA until such time as an arbitrator has found that an employee has been adversely affected. In essence, the carriers say that employees can not obtain benefits without showing adverse effect as a result of the transaction by loss of earnings, but they will not provide the employees with readily available data necessary to show loss of earnings until they are found to be adversely affected as a result of the transaction. This means that an employee must attempt to show loss of earnings based on pay stubs for the preceding twelve months. And it must be remembered that the loss of earnings is for the test period "time paid-for", so the employee must calculate his/her average hours worked for the preceding twelve months in addition to his/her average earnings.

Thus, there are substantial equitable reasons why the Board should require carriers to provide TPAs. Additionally, as the RLD demonstrated in its Comments on the ANPR, there is statutory and practice precedent for the provision of TPAs, and there is no good reason for the carriers to refuse to provide them. Accordingly, to insure that employees who have been adversely affected by a consolidation receive the benefits to which they are entitled, the Board should state that it will require that railroads provide each employee with his/her TPA, upon the employee's request.

VII. CROSS-BORDER ISSUES

In response to concerns raised by Rail Labor and other parties, the Board proposes to address cross-border concerns by creating a new Section 1180.1(k) titled “Transnational issues” and an affirmative requirement in new Section 1180.11 that applicants proposing transnational mergers provide additional information that addresses the issues raised by Section 1180.1(k). Finally, by adding a “Jobs Transferred to” column in the required employee impact exhibit that applicants must file (Proposed § 1180.6(b)(9)), the Board will require the applicants to identify anticipated cross-border transfers. These proposed rules specifically address Rail Labor’s concerns and should be adopted.

On one point however, we believe the Board should go further. As we explained in our Comments responding to the ANPR, this country does not permit foreign nationals to control our commercial airspace. The Board should promulgate a rule explicitly providing our rail system with the same protection. Therefore, we request that the Board add to its proposed Section 1180.1(k) the following provision:

(3) Applicants must provide assurance that operational control of rail trackage within the United States shall remain within the United States subject to regulation by the government of the United States.

CONCLUSION

For all of the reasons stated herein, the RLD urges the Board to adopt the changes in its major consolidations regulations, with the clarifications, modifications and additions that are described herein.

Respectfully submitted,

Rail Labor Division
Transportation Trades Department, AFL-CIO



Edward Dubroski
Chair, Rail Labor Division, TTD

Of Counsel:

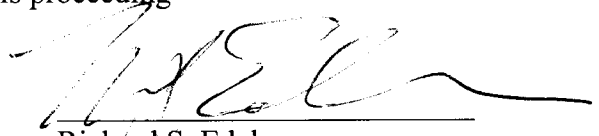
Richard S. Edelman
Donald F. Griffin
Mitchell M. Kraus
Harold A. Ross
Michael S. Wolly

Dated: November 17, 2000

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the foregoing Comments of the Rail Labor
Division Transportation Trades Department, AFL-CIO In Response To Notice Of Proposed
Rulemaking in Ex Parte No. 582 (Sub. No. 1) Major Rail Consolidations to be served by First
Class Mail on all persons listed on the service list for this proceeding

November 17, 2000
Date


Richard S. Edelman